

1 STEVE FLEISCHLI, Bar No. 175174
NOAH J. GARRISON, Bar No. 252154
2 NATURAL RESOURCES DEFENSE COUNCIL, INC.
1314 Second Street
3 Santa Monica, CA 90401
(310) 434-2300

4 Attorneys for NATURAL
5 RESOURCES DEFENSE COUNCIL, INC.
AND HEAL THE BAY

6 LIZ CROSSON, Bar No. 262178
7 TATIANA GAUR, Bar No. 246227
LOS ANGELES WATERKEEPER
8 120 Broadway, Suite 105
Santa Monica, CA 90401
9 (310) 394-6162

10 Attorneys for LOS ANGELES
WATERKEEPER
11 AND HEAL THE BAY

12 DANIEL COOPER, Bar No. 153576
LAWYERS FOR CLEAN WATER, INC.
13 1004A O'Reilly Avenue
San Francisco, CA 94129
14 (415) 440-6520

15 Attorney for LOS ANGELES
WATERKEEPER

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18 STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
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21 In the Matter of the Petition of NRDC, Los) MEMORANDUM OF POINTS AND
Angeles Waterkeeper, and Heal the Bay, for) AUTHORITIES IN SUPPORT OF
22 Review of Action by the California Regional) PETITION FOR REVIEW OF LOS
Water Quality Control Board, Los Angeles) ANGELES REGIONAL WATER
23 Region, in Adopting the Los Angeles County) QUALITY CONTROL BOARD
Municipal Separate Stormwater National) ACTION OF ADOPTING ORDER
24 Pollutant Discharge Elimination System) NO. R4-2012-0175
(NPDES) Permit; Order No. R4-2012-0175;)
25 NPDES Permit No. CAS004001)
26)
27)

1 **I. INTRODUCTION**

2 This petition seeks review of a pollution discharge permit that is both unlawful and
3 inadequate to protect the region’s waters or the public health. The Los Angeles Regional Water
4 Quality Control Board’s (“Regional Board” or “Board”) permit for Los Angeles County municipal
5 separate storm sewer systems (“MS4s”)¹ is the unfortunate result of six years of delay in renewing
6 the previous permit, and of largely ignoring the crucial need to address the region’s ongoing legacy
7 of water pollution. The 2012 Permit, and the process the Regional Board followed in adopting it,
8 were both deeply flawed, and impermissibly weaken or “backslide” from the requirements of the
9 previous, 2001 MS4 permit.² The critical—but by no means only—flaw of the 2012 Permit is that
10 it often abandons requirements to comply with both narrative and numeric water quality standards
11 in receiving waters as a means of protecting water quality. For the reasons discussed below,
12 Petitioners respectfully request that the State Water Resources Control Board (“State Board”)
13 overturn these unlawful provisions of the 2012 Permit, or remand the matter to the Regional Board
14 with specific direction to remedy the provisions of the 2012 Permit that violate state and federal
15 law.

16 The 2012 Permit is unlawful due to its inclusion of safe harbors from provisions, required
17 by the 2001 Permit, that require that discharges comply with Water Quality Standards. The safe
18 harbors—provisions that excuse compliance with Water Quality Standards in the Permit’s
19 Receiving Water Limitations section, are illegal for four principal reasons: 1) the safe harbors
20 violate federal anti-backsliding requirements; 2) the safe harbors violate state and federal
21 antidegradation requirements; 3) the safe harbors violate requirements for incorporation of TMDLs

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24 ¹ Regional Board, Waste Discharge Requirements for Municipal Separate Storm Sewer System
25 (MS4) Discharges Within the Coastal Watersheds of Los Angeles County, Except Those
26 Discharges Originating From the City of Long Beach, Order No. R4-2012-0175, NPDES Permit
27 No CAS004001 (Nov. 8, 2012) (“2012 Permit” or “Permit”).

28 ² Regional Board, Waste Discharge Requirements for Municipal Separate Storm Sewer and Urban
Runoff Discharges Within the County of Los Angeles, and the Incorporated Cities Therein, Except
the City of Long Beach, Order No. 01-182, NPDES Permit No. CAS004001 (Dec. 13, 2001)
 (“2001 Permit”).

1 into National Pollutant Discharge Elimination System permits; and, 4) the Regional Board failed to
2 make sufficient findings or provide evidence in the record to support the inclusion of the safe
3 harbors in the 2012 Permit.

4 These violations of law present compelling reasons for the State Board to exercise its
5 statutory duty to correct the unlawful actions of the Regional Board. These corrections are
6 seriously needed to protect the waters of Los Angeles County and the public health.

7 **A. Factual Background**

8 **1. Monitoring Demonstrates That the Los Angeles County MS4s Discharge**
9 **Pollution to Receiving Waters**

10 The stormwater systems regulated by the 2012 Permit discharge bacteria, metals, and other
11 pollutants at unsafe levels to rivers, lakes, and beaches in Los Angeles County. This pollution
12 causes increased rates of human illness, harm to the environment, and an economic loss of tens to
13 hundreds of millions of dollars every year from public health impacts alone. As the Regional
14 Board itself acknowledges:

15 Discharges of storm water and non-storm water from the . . . Los Angeles County
16 [MS4s] convey pollutants to surface waters throughout the Los Angeles Region. . . .
17 the primary pollutants of concern in these discharges . . . are indicator bacteria, total
18 aluminum, copper, lead, zinc, diazanon, and cyanide. Aquatic toxicity, particularly
during wet weather, is also a concern. . .

19 Pollutants in storm water and non-storm water have damaging effects on both
20 human health and aquatic ecosystems. Water quality assessments conducted by the
21 Regional Water Board have identified impairment of beneficial uses of water
22 bodies in the Los Angeles Region caused or contributed to by pollutant loading
from municipal storm water and non-storm water discharges.

23 (2012 Permit, at p. 13, Finding A.)^{3,4}

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25 _____
26 ³ This comports with the findings of the U.S. Environmental Protection Agency (“EPA”), which
27 considers urban runoff to be “one of the most significant reasons that water quality standards are
28 not being met nationwide.” (U.S. General Accounting Office (June 2001) Water Quality: Better
Data and Evaluation of Urban Runoff Programs Needed to Assess Effectiveness, Report No.
GAO-01-679, at 37.)

1 The pollutants that impair the region’s waters come in large part from the MS4s subject to
2 the permit at issue. Monitoring data from mass emission stations in area streams and rivers
3 demonstrate that the MS4s persistently contribute to violations of Water Quality Standards and
4 cleanup targets (total maximum daily loads or “TMDLs”) in Los Angeles area water bodies.
5 Monitoring revealed 1,105 violations since 2003 of water quality limits for fecal bacteria, various
6 heavy metals, ammonia, pH, and cyanide, among other constituents, in Ballona Creek, Malibu
7 Creek, the Los Angeles River, Santa Clara River, Dominguez Channel, and Coyote Creek.⁵

8 Monitoring conducted by non-profit organizations confirms that MS4s in Los Angeles
9 County pollute in the region. Data collected by these organizations show:

- 10 • Malibu Creek routinely exceeded limits for nitrogen, ammonia, phosphate, E.coli,
11 and enterococcus bacteria during wet and dry weather.⁶
- 12 • Compton Creek commonly exceeded applicable pollution limits; the highest
13 magnitude of exceedances occurred during storm events at storm drain outfalls.⁷
- 14 • 13 of 22 sites sampled in the Los Angeles River watershed during 2005 received an
15 F grade for failing water quality standards for PH, temperature, dissolved solids,
16 nutrients, dissolved oxygen, and turbidity.⁸
- 17 • Dry weather discharges from 18 storm drains flowing into Ballona Creek, which is
18 impaired by fecal bacteria, had consistently high levels of bacteria.⁹

19 ⁴ Unless otherwise noted, all references to documents in this brief are to documents that were
20 timely submitted to the Regional Board and are part of the record in this matter. We include
21 documents originally submitted by Petitioners here for the convenience of the State Water
22 Resources Control Board (“State Board”).

23 ⁵ Los Angeles County, Dept. of Public Works, Stormwater Monitoring Reports for 2003-2004
(Aug. 15, 2004), 2005-2006 (Aug. 22, 2006), 2006-2007 (Sept. 4, 2007), 2007-2008 (Aug. 20,
2008), 2008-2009 (Aug. 25, 2009), 2009-2010 (Aug. 12, 2010), 2010-2011 (Aug. 11, 2011),
(selected data tables attached and full documents available at
http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm, last visited July 19, 2012).

24 ⁶ See Exhibit A1: Heal the Bay, Water Quality in Malibu Creek Watershed and Surrounding
25 Reference Sites; Exhibit A2: Heal the Bay, Malibu Watershed Exceedances, Raw Data (1998-
2010).

26 ⁷ See Exhibit B1: Heal the Bay, Monitoring Plan for Compton Creek; Exhibit B2: Heal the Bay,
27 Sediment Data Analysis – Compton Creek (2006-2011); Exhibit B3: Heal the Bay, Water Data
28 Analysis – Compton Creek (2006-2011).

⁸ Friends of the Los Angeles River (2005) The First State of the Los Angeles River Report, at 3.

⁹ See Exhibit C: Los Angeles Waterkeeper, Ballona Creek Data (2011-2012).

1 Receiving water sampling conducted in Ballona Creek, together with dry weather storm drain
2 sampling, as well as monitoring from the City of Malibu, demonstrate a link between polluted
3 storm drain discharges and exceedances of water quality standards, and that the MS4 system is a
4 significant source of this pollution to receiving waters.¹⁰

5 Finally, California Ocean Plan standards and fecal bacteria TMDL limits established to
6 protect the health of beachgoers have been exceeded on thousands of occasions. Monitoring
7 identified 3,369 exceedances of beach bacteria TMDL limits at 65 Los Angeles County beach
8 monitoring locations during the April – October dry weather season from 2006 through 2011,
9 exposing the public to various well-documented health risks associated with recreating in polluted
10 water.¹¹

11 **2. Stormwater Pollution Threatens Public Health**

12 Polluted urban runoff increases bacteria levels and illness rates among swimmers.¹²
13 Contact with waters contaminated by stormwater runoff can lead to fever, chills, ear infections and
14 discharge, coughing and respiratory ailments, vomiting, diarrhea and other gastrointestinal illness,
15 and skin rashes.¹³ Scientists reviewing 22 epidemiological studies found that 19 of them showed
16 that adverse health effects were significantly related to fecal indicator bacteria or bacterial
17 pathogens.¹⁴ One local analysis investigated health risks of people exposed to storm drain runoff
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19 ¹⁰ *Id.*; Exhibit D: Los Angeles Waterkeeper, Malibu 2011-2012 Storm Water Monitoring.

20 ¹¹ See, Exhibit F: Heal the Bay, Santa Monica Bay Bacteria TMDL Tally; see also Exhibit G: Los
21 Angeles Waterkeeper, Area of Special Biological Significance [ASBS] Malibu Data Revised
22 March 27, 2012; Exhibit H: Los Angeles Waterkeeper, Non-ASBS and Malibu Creek Data
Revised March 27, 2012.

23 ¹² Curriero et al. (August 2001) *The Association Between Extreme Precipitation and Waterborne*
24 *Disease Outbreaks in the United States, 1949-1994*, American Journal of Public Health, 91:8
1194-1199. See also, Letter from Dr. Jennifer Jay to Mr. Sam Unger, Executive Officer and
Members of the Board, Regional Board re: MS4 Permit for Los Angeles County, July 23, 2012.

25 ¹³ See, e.g., Haile, et al. (1999) *The Health Effects of Swimming in Ocean Water Contaminated by*
26 *Storm Drain Runoff*, Epidemiology 10(4): 355-63; Haile, R. W. et al (1996) *An Epidemiological*
27 *Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay*, Santa Monica Bay
Restoration Project, 70 pp.

28 ¹⁴ Pruss, A. (1998) *Review of epidemiological studies on health effects from exposure to*
recreational waters, International Journal of Epidemiology 27:1-9.

1 while swimming in Santa Monica Bay and found that swimmers exposed directly in front of a
2 storm drain experienced increased health risks of approximately 50-100 percent compared with
3 people swimming more than 400 yards away from the drain.¹⁵

4 The Regional Board itself has acknowledged that the harm to the public from exceeding
5 bacteria standards “is dramatic both in terms of health impacts to exposed beachgoers, and the
6 economic cost to the region associated with related illnesses.” (2001 Permit (as amended by Order
7 R4-2009-0130), at p. 16, Finding E.32.) These health impacts come at tremendous cost—one
8 study demonstrated that swimming at polluted beaches in Los Angeles County caused between
9 427,800 and 993,000 excess cases of gastroenteritis per year, resulting in annual health costs of
10 between \$14 and \$35 million, or \$120 and \$278 million per year (depending on whether only
11 market costs or both market and non-market costs, such as willingness-to-pay not to get sick, were
12 considered).¹⁶

13 **3. Controlling stormwater pollution provides numerous economic benefits,** 14 **while stormwater pollution creates many economic harms**

15 Controlling pollution from MS4 systems has far-reaching economic and social benefits for
16 the region. According to a report to California’s Resources Agency, “California has the largest
17 Ocean Economy in the United States, ranking number one overall for both employment and gross
18 state product. . . .”¹⁷ One study estimated that local beach goers in California spend as much as
19 \$9.5 billion annually and the non-market values associated with beach going in California may be
20 as high as \$5.8 billion annually.¹⁸

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22 ¹⁵ Haile, R. W. et al (1996) *An Epidemiological Study of Possible Adverse Health Effects of*
23 *Swimming in Santa Monica Bay*, Santa Monica Bay Restoration Project, at 54; see also, Haile, et
24 al. (1999) *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*,
25 *Epidemiology* 10(4): 355-63.

26 ¹⁶ Given, S., et al. (2006) *Regional Public Health Cost Estimates of Contaminated Coastal Waters:*
27 *A Case Study of Gastroenteritis at Southern California Beaches*, *Environmental Science &*
28 *Technology* 40(16): 4851-4858, at 4856.

¹⁷ Kildow, J. and Colgan, C.S. (2005) National Ocean Economics Program, California’s Ocean
Economy: A Report to the Resources Agency, State of California, at 1.

¹⁸ Pendleton, L. (July 2004) *Harvesting Ocean Observing Technologies to Improve Beach*
Management: Estimating the Regional Economic Benefits of Improvements in the California

1 Unfortunately, stormwater runoff in Los Angeles County’s coastal waters causes or
2 contributes to an enormous number of beach closures or advisories each year.¹⁹ Beach closures
3 and advisories result in direct and indirect negative effects on the coastal economy, such as lost
4 revenue.²⁰ One study estimated that a hypothetical beach closure of Huntington Beach for one day
5 would result in a loss of 1200 beach visits and associated economic losses of \$100,000.²¹
6 Conversely, the National Oceanic and Atmospheric Association found that improving water
7 quality in Long Beach from a C grade to the healthier standards of Huntington City Beach (a B
8 grade) would create \$8.8 million in economic benefits over a 10-year period.²²

9 Moreover, the economic and social benefits of stormwater regulation, such as those
10 achievable through this Permit, far outweigh the costs of implementation. For example, the staff
11 report for the Metals TMDL for the Los Angeles River and its tributaries found that removing
12 metals from the waterways would have benefits of as much as \$18 billion (if structural systems
13 were used), in comparison to costs of between \$5.7 and \$7.4 billion.²³ This would be in addition
14 to “[u]nquantifiable health benefits” associated with implementation.²⁴

16 *Coastal Ocean Observing System* Arlington, VA: Ocean. Unnumbered Report. July; see also,
17 Chapman, D. and Hanemann, M. (2001) *Environmental Damages in Court: the American Trader*
18 *Case*, in *The Law and Economics of the Environment*, (Heyes, edit.), pp. 319-367 (estimating a
19 “consumer surplus” of \$8.16 to \$60.79 per visit for each beachgoer).

20 ¹⁹ NRDC (2012) *Testing the Waters: A Guide to Water Quality at Vacation Beaches*, at California
21 Chapter Summary. Los Angeles County reported 2,430 total closing or advisory days in 2011
22 from all sources. Reported closing or advisory days are for events lasting six consecutive weeks or
23 less. Available at <http://www.nrdc.org/water/oceans/ttw/ca.asp>.

24 ²⁰ See, Leeworthy, V.R. and Wiley, P.C. (2000) *Southern California Beach Valuation Project:*
25 *Economic Value and Impact of Water Quality Change for Long Beach in Southern California*,
26 National Oceanic and Atmospheric Administration, at 4.

27 ²¹ Hanemann, M., et al. (November 2005) *Welfare Estimates for Five Scenarios of Water Quality*
28 *Change in Southern California: A Report from the Southern California Beach Valuation Project*, at
7-8.

²² Leeworthy, V.R. and Wiley, P.C. (2000) *Southern California Beach Valuation Project:*
Economic Value and Impact of Water Quality Change for Long Beach in Southern California,
National Oceanic and Atmospheric Administration, at 9, 15.

²³ Regional Board and U.S. EPA Region 9 (June 2, 2005) *Total Maximum Daily Loads for Metals*
Los Angeles River and Tributaries, at 77.

²⁴ *Id.*; See 2012 Permit, Attachment F (“Fact Sheet”), at 76-77.

1 **B. Legal Background**

2 In 1972, Congress enacted the Clean Water Act (“CWA”) to “restore and maintain the
3 chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. § 1251(a); see
4 also, *NRDC v. U.S.E.P.A.*, 859 F.2d 156, 198 (D.C. Cir. 1988); *NRDC v. Costle*, 568 F.2d 1369,
5 1373 (D.C. Cir. 1977); *American Frozen Foods Inst. v. Train*, 539 F. 2d 107, 124 (D.C. Cir.
6 1976).) The Act sought to eliminate the discharge of pollutants into navigable waters by 1985, and
7 to achieve fishable and swimmable conditions, wherever possible, by 1983. (33 U.S.C. §
8 1251(a)(1)-(2).) Courts have consistently recognized that the CWA is a tough law—“strong
9 medicine.” (*Texas Municipal Power Agency v. U.S. EPA* (5th Cir. 1988) 836 F.2d 1482, 1488.)²⁵

10 Overall, the Act prohibits the discharge of any pollutant from a point source into a water of
11 the United States except as in compliance with the Act. (33 U.S.C. §§ 1311(a), 1342.) “Point
12 source” is defined to mean any discrete “conveyance,” such as a pipe or channel, (33 U.S.C. §
13 1362(14)), and thus includes MS4s, which are elaborate networks of such conveyances. (33
14 U.S.C. §§ 1342(p), 1362(14).)²⁶ A point source, such as an MS4, can comply with the CWA by
15 obtaining a discharge permit under the National Pollutant Discharge Elimination System
16 (“NPDES”) program. (33 U.S.C. § 1342(b), (p).)

17 The CWA requires each state to adopt Water Quality Standards (“WQSs”) for all waters
18 within its boundaries and submit them to the U.S. Environmental Protection Agency (“EPA”) for
19 approval. (33 U.S.C. §§ 1311(b)(1)(C), 1313.) WQSs include maximum permissible pollutant
20 levels that must be sufficiently stringent to protect public health and enhance water quality,
21 consistent with the uses for which the water bodies have been designated. (33 U.S.C. §

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23 ²⁵ “The [Clean Water Act] is strong medicine. . . . Congress explicitly recognized that reduction of
24 the amount of effluents—not merely their dilution or dispersion—is the goal of the [Act].” (*Texas
Municipal Power Agency*, 836 F.2d at 1488.)

25 ²⁶ The discharge of pollutants from an MS4, often called “polluted runoff” or “urban runoff,” is a
26 two-part problem. It includes what is often referred to as non-stormwater discharges—typically,
27 landscape irrigation flows, washwater, and other flows not related to precipitation carrying
28 herbicides, bacteria, metals, used motor oil, and other pollutants. And it includes urban
stormwater—which is basically what it sounds like—storm flows that contain pollutants from the
urban environment. (*See* 33 U.S.C. § 1342(p)(3)(B)(ii)-(iii).)

1 1313(c)(2)(A.) WQSs provide the reference point “to prevent water quality from falling below
2 acceptable levels.” (*PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology* (1994) 511
3 U.S. 700, 704 [quotation omitted].) States also must identify as impaired any water bodies that fail
4 to meet water quality standards. (33 U.S.C. § 1313(d).)

5 For impaired waters, states must establish TMDLs, which set a daily limit on the discharge
6 of each pollutant necessary to achieve water quality standards. (*Id.* § 1313(d)(1).) The TMDL
7 “assigns a **waste load allocation (WLA)** to each point source, which is that portion of the TMDL’s
8 total pollutant load, which is allocated to a point source for which a NPDES permit is required.”
9 (*Communities for a Better Env’t v. State Water Res. Control Bd.* (2005) 132 Cal.App.4th 1313,
10 1321 (emphasis in original).) Critically, federal law requires that “once a TMDL is developed,
11 effluent limitations in NPDES permits must be consistent with the WLA’s in the TMDL.” (*Id.*, at
12 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B).) According to EPA, which oversees
13 implementation of the CWA, “[w]here the TMDL includes WLAs for stormwater sources that
14 provide numeric pollutant load . . . the WLA should, where feasible, be translated into numeric
15 [water quality-based effluent limitations] in the applicable stormwater permits.”²⁷

16 Like other NPDES permits, MS4 permits must ensure that discharges from storm sewers do
17 not cause or contribute to a violation of water quality standards. (33 U.S.C. § 1311(a); 1313;
18 1341(a); 1342(p).)²⁸ Renewal permits—like the 2012 Permit, at issue—may not contain weaker

20 ²⁷ Memorandum from James A. Hanlon and Denise Keehner, U.S. EPA, to Water Management
21 Division Directors, Regions 1 – 10, re: Revisions to the November 22, 2002 Memorandum
22 "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm
23 Water Sources and NPDES Permit Requirements Based on Those WLAs, November 12, 2010,
24 ("EPA Hanlon Memo") at 3. (Attached as Request for Notice ("RN") "Exhibit A".)

25 ²⁸ See, e.g., State Board Order No. WQ 99-05, *Own Motion to Review the Petition of*
26 *Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03*; In
27 addition, permits for discharges from municipal storm sewers “shall require controls to reduce the
28 discharge of pollutants to the maximum extent practicable . . . and such other provisions as the
Administrator or the State determines appropriate for the control of such pollutants. (33 U.S.C.
§ 1342(p)(3)(B)(iii).) This language in section 1342(p) has been held by California courts to grant
“the EPA (and/or a state approved to issue the NPDES permit) . . . the discretion to impose
‘appropriate’ water pollution controls in addition to those that come within the definition of
‘maximum extent practicable.’” (*Building Industry Ass’n of San Diego County v. State Water*

1 standards than those contained in the previous permit, except under limited circumstances. (33
2 U.S.C. § 1342(o); 40 C.F.R. § 122.44(l).) Federal and state law additionally require
3 implementation of an antidegradation policy, that mandates that existing water quality in navigable
4 waters be maintained unless degradation is justified by specific findings. (See, 40 C.F.R. §
5 131.12(a)(1).)

6 **1. The 2001 Los Angeles County MS4 Permit**

7 In 2001, the Regional Board adopted an NPDES permit for MS4s in Los Angeles County,²⁹
8 which was intended to address the harm caused by pollutants conveyed via storm drains to surface
9 waters in the Los Angeles area. The permit regulated Los Angeles County, the Los Angeles
10 County Flood Control District, and 84 incorporated cities within the County.

11 Importantly, the 2001 Permit contained Receiving Water Limitations (“RWLs”), which
12 required that “discharges from the MS4 that cause or contribute to the violation of Water Quality
13 Standards or water quality objectives are prohibited.” (2001 Permit, at Part 2.1.)³⁰ The Permittees
14 were directed to begin remedial measures immediately if discharges violate water quality
15 standards. (*Id.*, at Part 2.3.) If exceedances of water quality standards persisted, notwithstanding
16 control measures, the Permittees “shall assure compliance” by preparing a compliance report that
17 identifies the violations and adopting more stringent pollution control measures to correct them.
18 (*Id.*)

19 Complying with the 2001 Permit’s iterative process assisted Permittees in meeting water
20 quality goals, but did not excuse violations of water quality standards. An earlier MS4 permit for
21 Orange County, approved by the State Board, had included language stating “the permittees will
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24 *Resources Control Bd.* (2004) 124 Cal.App.4th 866, 883 (citing *Defenders of Wildlife v. Browner*
25 (9th Cir. 1999) 191 F.3d 1159, at 1165–1167).)

26 ²⁹ This was the third such permit issued by the Regional Board to Los Angeles County and local
municipalities. Prior permits were adopted in 1990 and 1996. (2001 Permit, p. 1, Finding A.)

27 ³⁰ “Water Quality Standards and Water Quality Objectives” are defined in the 2001 Permit to mean
28 “water quality criteria contained in the Basin Plan, the California Ocean Plan, . . . the California
Toxics Rule, and other state or federally approved surface water quality plans.” (2001 Permit, at
Part 5, p. 70.)

1 not be in violation of [receiving water limitations] so long as they are in compliance with [the
2 iterative process set forth in the permit].”³¹ EPA objected to that provision, (which MS4 permits
3 for Vallejo and Riverside County had additionally adopted), as a “safe harbor,” meaning the
4 provision deemed the permittees in compliance with the permit regardless of whether Water
5 Quality Standards were then met. In response, the State Board directed the Regional Boards to
6 include receiving water limitations language devised by EPA, without a safe harbor provision, into
7 all future MS4 permits.³²

8 The Regional Board followed this clear directive in the 2001 Permit. Indeed, when the
9 County and 43 cities challenged the permit in state court, the court ruled that the Regional Board
10 “included Parts 2.1 and 2.2 in the Permit without a ‘safe harbor.’” (*Id.*)³³ The Regional Board
11 supports this interpretation: “the plain meaning of these provisions is clear: they prohibit
12 discharges that cause or contribute to a ‘violation of Water Quality Standards’ [or water quality
13 objectives] or to a condition of nuisance.” Put simply, “[t]he Regional Board’s position . . . is that
14 the Permit cannot be read to excuse exceedances of water quality standards.”³⁴ Finally, the Ninth
15 Circuit confirmed the state court’s interpretation of the 2001 Permit’s Receiving Water
16 Limitations, holding that “no such ‘safe harbor’ is present in this Permit. . . . [there is] no textual
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21 ³¹ See, State Board Order No. WQ 98-01, *Own Motion to Review the Petition of Environmental*
Health Coalition to Review Waste Discharge Requirements Order No. 96-03, at 6-7.

22 ³² See, State Board WQ Order 99-05.

23 ³³ See, *In re L.A. County Mun. Storm Water Permit Litigation.*, No. BS 080548 at 4-7 (L.A. Super.
24 Ct. Mar. 24, 2005) (“*L.A. County Mun. Stormwater*”). The court noted that, “the Regional Board
25 acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a ‘safe harbor,’
26 whether or not compliance therewith requires efforts that exceed the ‘MEP’ standard.” (*In re L.A.*
County Mun. Stormwater, at 7.) But regardless of this authority, as described above, the Court
27 found that “the terms of the Permit taken, as a whole, constitute the Regional Board’s definition of
28 MEP, including, but not limited to, the challenged Permit Provisions.” (*Id.* at 7-8.)

³⁴ Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region,
in *Santa Monica Baykeeper v. City of Malibu* No. CV 08-1465-AHM (PLAx) (C.D. Cal.) (filed
Feb. 5, 2010), at 9; *see also, id.* at 4.

1 support for the proposition that compliance with certain provisions shall forgive non-compliance
2 with the discharge prohibitions.”³⁵

3 **2. The 2012 Permit**

4 On November 8, 2012, the Regional Board adopted a new MS4 permit for Los Angeles
5 County. Like the prior 2001 Permit, the 2012 Permit states that, “Discharges from the MS4 that
6 cause or contribute to the violation of receiving water limitations are prohibited.” (2012 Permit, at
7 Part V.A.1.)³⁶ Rather than maintaining the 2001 Permit’s strict prohibition against discharges that
8 cause or contribute to an exceedance of Water Quality Standards, however, the Permit instead
9 incorporates several safe harbors that create broad exemptions to the RWLs section, rendering the
10 limitations inoperative in certain circumstances.

11 Under the 2012 Permit, Permittees have several different compliance options, two of which
12 trigger application of a safe harbor. In particular, dischargers may elect to develop or participate in
13 a Watershed Management Program (“WMP”), or Enhanced Watershed Management Program
14 (“EWMP”). (2012 Permit, at Part VI.C.) These programs in many aspects allow a permittee to
15 draft their own permit requirements, conditions, and schedules for compliance. Under a WMP, a
16 permittee is required to identify water quality priorities (*id.* at VI.C.5.a), select watershed control
17 measures to be implemented, (*id.* at VI.C.5.b), and establish compliance schedules for addressing
18 water quality priorities. (*Id.* at VI.C.5.c.) For an EWMP, a permittee must, where feasible within
19 a given watershed, retain all storm water runoff from the 85th percentile, 24-hour storm event for
20 the drainage areas tributary to the projects. (*Id.* at VI.C.1.g.) Under both options, Permittees must
21 conduct a “reasonable assurance” analysis to assess whether the programs will result in discharges
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24 ³⁵ *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F.3d 880, 897. This
25 portion of the 9th Circuit Court’s Opinion is not subject to further review.

26 ³⁶ The Permit defines “Receiving Water Limitation” as: “Any applicable numeric or narrative
27 water quality objective or criterion, or limitation to implement the applicable water quality
28 objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality
Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies
adopted by the State Water Board, or federal regulations, including but not limited to, 40 CFR §
131.38.” (Permit, at Attachment A, A-17.)

1 that achieve water quality based effluent limitations and RWLs in the 2012 Permit. (*Id.* at
2 VI.C.1.g; VI.C.5.b.iv(5).)

3 Although it is a goal of these programs to ensure that stormwater discharges do not cause
4 or contribute to exceedances of RWLs, (see, e.g., *id.* at VI.C.5.b.ii), and that TMDL WLAs are
5 achieved, it is not a requirement that the programs achieve these results in fact. Permittees are
6 instead given a safe harbor from the prohibition on violations of RWLs, or, in some cases of
7 TMDL limits, if they participate in a WMP or an EWMP. The safe harbors include relief from
8 RWL compliance: 1) during the development of a WMP or an EWMP, before the plan is
9 approved; 2) after a plan is submitted to and approved by the Regional Board; and, 3) when the
10 specific RWL (or combination of water quality standard and waterbody) at issue is already
11 addressed by a TMDL.³⁷

12 More specifically, in the first instance, a safe harbor applies to discharges by a permittee
13 upon notification of its intent to develop a WMP or an EWMP to the Regional Board. During the
14 period of plan development and review (up to 28 months from the 2012 Permit adoption date for a
15 WMP or 40 months from the 2012 Permit adoption date for an EWMP before it may be approved
16 (*Id.* at VI.C.4.a.)), the permittee is excused for violations of the Permit's RWLs:

- 17 • “Upon notification of a Permittee’s intent to develop a WMP or EWMP and prior
18 to approval of its WMP or EWMP, a Permittee’s full compliance with all of the
19 following requirements shall constitute a Permittee’s compliance with the receiving
water limitations provisions in Part V.A. not otherwise addressed by a TMDL
.....³⁸

20 (2012 Permit, at Part VI.C.2.d.)³⁹ Second, after approval of a Permittee’s WMP or EWMP
21 by the Regional Board or the Board’s Executive Officer, a safe harbor removes liability for
22

23 _____
24 ³⁷ In this last case, in some circumstances the 2012 Permit provides a safe harbor for compliance
with either interim or final TMDL limits, or both.

25 ³⁸ We note that the Regional Board lacks authority to exempt state law requirements prohibiting
the causation of a condition of nuisance under Part V.A.2.

26 ³⁹ The Permittee is required to: “i. Provide[] timely notice of its intent to develop a WMP or
27 EWMP, ii. Meet[] all interim and final deadlines for development of a WMP or EWMP, iii. For
the area to be covered by the WMP or EWMP, target[] implementation of watershed control
28 measures in its existing storm water management program . . . and iv. Receive[] final approval of

1 a violation of all RWLs if the WMP or EWMP addresses that pollutant/waterbody
2 combination, regardless of whether or not compliance with the RWL is actually achieved:

- 3 • “A Permittee’s full compliance with all requirements and dates for their
4 achievement in an approved Watershed Management Program or EWMP shall
5 constitute a Permittee’s compliance with the receiving water limitations provisions
6 in Part V.A. of this Order for the specific water body-pollutant combinations
7 addressed by an approved Watershed Management Program or EWMP.”

8 (*Id.* at VI.C.2.b.) Third, the 2012 Permit provides a safe harbor from certain TMDL
9 requirements. Specifically, the 2012 Permit provides a safe harbor for interim TMDL
10 WLAs for permittees indicating their intent to develop a WMP or an EWMP:

- 11 • “Upon notification of a Permittee’s intent to develop a WMP or EWMP and prior to
12 approval of its WMP or EWMP, a Permittee’s full compliance with all of the following
13 requirements⁴⁰ shall constitute a Permittee’s compliance with provisions pertaining to
14 interim WQBELs with compliance deadlines occurring prior to approval of a WMP or
15 EWMP.”

16 (*Id.* at VI.E.2.d.i(4)(d).) And, for permittees implementing an EWMP, the 2012 Permit provides a
17 safe harbor for all TMDL final limits other than for Trash TMDLs:

- 18 • “A Permittee shall be deemed in compliance with an applicable final water quality-based
19 effluent limitation and final receiving water limitation for the pollutant(s) associated with a
20 specific TMDL if. . . In drainage areas where Permittees are implementing an EWMP, (i)
21 all non-storm water and (ii) all storm water runoff up to and including the volume
22 equivalent to the 85th percentile, 24-hour event is retained for the drainage area tributary to
23 the applicable receiving water.”

24 (*Id.* at VI.E.2.e.i(4).) By allowing these safe harbors, the 2012 Permit excuses compliance with
25 TMDL WLAs, and with its RWLs where the 2001 Permit mandated compliance.

26 its WMP or EWMP within 28 or 40 months, respectively.” (Permit, at Part VI.C.3.b.i-iv.) The
27 safe harbor does not apply to interim Trash TMDL limits.

28 ⁴⁰ The Permittee is required to to: “i. Provide[] timely notice of its intent to develop a WMP or
EWMP, ii. Meet[] all interim and final deadlines for development of a WMP or EWMP, iii. For
the area to be covered by the WMP or EWMP, target[] implementation of watershed control
measures in its existing storm water management program . . . and iv. Receive[] final approval of
its WMP or EWMP within 28 or 40 months, respectively.” (2012 Permit, at Parts
VI.E.2.d.i(4)(d)(1)-(4).)

1 **II. STANDARD OF REVIEW**

2 The State Board must exercise its independent judgment as to whether a Regional Board
3 action is reasonable. (See, *Stinnes-Western Chemical Corp.*, State Board WQ Order No. 86-16
4 (1986).) Specifically, the State Board’s review is equivalent to the standard a reviewing court
5 would apply under California Code of Civil Procedure Section 1094.5, (*id.*), which states “[a]buse
6 of discretion is established if the respondent has not proceeded in the manner required by law, the
7 order or decision is not supported by the findings, or the findings are not supported by the
8 evidence.” (Cal. Civ. Proc. Code § 1094.5(b); see also, *Zuniga v. Los Angeles County Civil Serv.*
9 *Comm’n* (2006) 137 Cal.App.4th 1255, 1258 (applying same statutory standard).) “Where it is
10 claimed that the findings are not supported by the evidence, . . . abuse of discretion is established if
11 the court determines that the findings are not supported by the weight of the evidence.” (Cal. Civ.
12 Proc. Code § 1094.5(c).)

13 The administrative decision must be accompanied by findings that allow the court
14 reviewing the order or decision to “bridge the analytic gap between the raw evidence and ultimate
15 decision or order.” (*Topanga Ass’n for a Scenic Cmty. v. County of Los Angeles* (1974) 11 Cal.3d
16 506, 515.) This requirement “serves to conduce the administrative body to draw legally relevant
17 sub-conclusions supportive of its ultimate decision . . . to facilitate orderly analysis and minimize
18 the likelihood that the agency will randomly leap from evidence to conclusions.” (*Id.* at 516.)
19 “Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming
20 explorations; it would have to grope through the record to determine whether some combination of
21 credible evidentiary items which supported some line of factual and legal conclusions supported
22 the ultimate order or decision of the agency.” (*Id.* at 516, n.15.)

1 **III. ARGUMENT**

2 **A. The Permit Creates Illegal Safe Harbors in Violation of Federal Anti-Backsliding and**
3 **Antidegradation Requirements**

4 **1. The 2012 Permit Creates Safe Harbors that Exempt Compliance with**
5 **Receiving Water Limitations in Some Circumstances**

6 Rather than maintaining the 2001 Permit’s prohibition against discharges that cause or
7 contribute to an exceedance of water quality standards, the 2012 Permit creates safe harbors that
8 exempt compliance with the Receiving Water Limitations for Permittees that elect to participate in
9 a WMP or an EWMP. These safe harbor provisions violate multiple provisions of the CWA and
10 other federal and state regulations, and render the 2012 Permit unlawful.

11 The 2012 Permit creates safe harbors by deeming a Permittee to be in compliance with the
12 Permit’s RWLs (which was required by the 2001 Permit), both once a WMP or an EWMP has
13 been approved by the Regional Board and during plan development.⁴¹ The Ninth Circuit defined a
14 “safe harbor” as “the proposition that compliance with certain provisions shall forgive non-
15 compliance with the discharge prohibitions.” (*Natural Resources Defense Council, Inc. v. County*
16 *of Los Angeles* (9th Cir. 2011) 673 F.3d 880, 897 (cert. granted on other grounds).) Unfortunately,
17 the new Permit establishes just such a program. If a Permittee meets the program requirements for
18 a WMP or an EWMP, it *legally* complies with the 2012 Permit’s RWLs, regardless of whether the
19 RWLs are *actually* achieved.

20 During the 2012 Permit adoption hearing,⁴² the Regional Board’s Executive Officer
21 admitted that these provisions provide a safe harbor from liability for RWL violations. While
22 attempting to define each provision as only a “compliance mechanism,” Mr. Sam Unger stated, “at
23 best, it’s a conditional safe harbor.”⁴³ Similarly, Mr. Unger stated: “Permittees have to be in

24 ⁴¹ We note that the 2012 Permit’s approach is nonsensical in this regard, as it creates a safe harbor
25 from compliance with Receiving Water Limitations (and for interim TMDL limits) prior to
26 approval of a WMP or an EWMP, while the safe harbor is ultimately expressly conditioned on the
27 approval of the TMDL.

28 ⁴² Regional Board, In the Matter of the Regional Board Public Meeting/Hearing, Thursday,
November 8, 2012. (“November 8 Hearing.”)

⁴³ Mr. Sam Unger, Executive Officer, Regional Board, November 8 Hearing, at 346:25.

1 compliance with the milestones and the activities set out in developing the plan for the watershed
2 management program. And if they're not, then the operative part of the permit that would take
3 place is these receiving water limitation[s].”⁴⁴ Precisely—the effect of this scheme is that if a
4 Permittee is in compliance with the requirements of a WMP or an EWMP, the Receiving Water
5 Limitations are *not* operative. There is simply no defensible argument that these provisions
6 constitute anything other than safe harbors, which violate federal and state law.

7 **2. The 2012 Permit’s Safe Harbors Violate Federal Anti-Backsliding**
8 **Requirements**

9 Clean Water Act and federal regulations prohibit backsliding, or weakening of permit
10 terms, from the previous permit. Section 402(o)(1) of the Clean Water Act requires that, for
11 effluent limitations based on a state standard, “a permit may not be renewed, reissued, or modified
12 to contain effluent limitations which are less stringent than the comparable effluent limitations in
13 the previous permit,” except in circumstances not present here. (33 U.S.C. § 1342(o)(1).)
14 Similarly, federal regulations require that “when a permit is renewed or reissued, interim effluent
15 limitations, standards or conditions must be at least as stringent as the final effluent limitations,
16 standards, or conditions in the previous permit. . . .” (40 C.F.R. § 122.44(l)(1).) By providing a
17 safe harbor waiving requirements to meet Water Quality Standards, the 2012 Permit flatly violates
18 these federal requirements.

19 **a. The Safe Harbors Render the RWLs Less Stringent Than in the Previous**
20 **Permit**

21 The Permit allows a Permittee participating in a WMP or an EWMP to comply with
22 Receiving Water Limitations, even if a Permittee’s discharges actually cause or contribute to an
23 exceedance of the Receiving Water Limitations, including violations of Water Quality Standards.
24 By contrast, the 2001 Permit required compliance with WQSS. Thus, the 2012 Permit excuses
25 discharges of pollution and violations of WQSS that the previous permit prohibited.

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27
28 ⁴⁴ Mr. Sam Unger, Executive Officer, Regional Board, November 8 Hearing, at 324:8-12.

1 **b. The Receiving Water Limitations Cannot be Weakened Unless Consistent**
2 **With 1313(d)(4) or 402(o)**

3 Section 402(o) of the Clean Water Act (33 U.S.C. § 1342(o)), generally prohibits
4 relaxation of, among other things, an effluent limitation “necessary to meet water quality standards
5 . . . schedules of compliance, established pursuant to any State law or regulations . . . or any other
6 Federal law or regulation, or required to implement any applicable water quality standard
7 established pursuant to” the CWA. (See, 33 U.S.C. § 1342(o)(1); 33 U.S.C. § 1311(b)(1)(C).)⁴⁵
8 Although a permit may contain less stringent requirements if the change is consistent with the
9 requirements of 33 U.S.C. § 1313(d)(4) or the enumerated exceptions in section 402(o)(2).⁴⁶ The
10 safe harbors in the 2012 Permit satisfy none of these conditions.

11 **i. The Receiving Water Limitations Are Covered by Anti-**
12 **Backsliding Requirements as “Effluent Limitations” and**
13 **“Standards or Conditions” of the 2001 Permit**

14 The Clean Water Act defines the term “effluent limitation” broadly, as “any restriction
15 established by a State or the Administrator on quantities, rates, and concentrations of chemical,
16 physical, biological, and other constituents which are discharged from point sources. . . .” (33
17 U.S.C. § 1362(11).) By prohibiting the “discharge” of any pollutant in quantities sufficient to
18 cause or contribute to an exceedance of Receiving Water Limitations, the RWLs easily fit within
19 this sweeping definition. (See also, *NRDC v. U.S.E.P.A.* (D.C. Cir. 1981) 656 F.2d 768, 775-76
20 (as a practical matter the limitation restricted the discharge of pollution and consequently was an
21 effluent limitation), *NRDC v. U.S.E.P.A.* (D.C. Cir. 1982) 673 F.2d 400, 403 (33 U.S.C. §
22 502(11) “defines ‘effluent limitation’ as ‘any restriction’, not just numeric limitations”).)

23 ⁴⁵ We note that EPA has recognized that providing additional time for compliance for a provision
24 required by the previous permit violates anti-backsliding requirements. (Letter from Jon M.
25 Capacasa, Director Water Protection Division, EPA Region III to Jay Sakai, Maryland Department
26 of the Environment, re: Specific Objection to Prince George’s County Phase I Municipal Separate
27 Storm Sewer System (MS4) Permit MD0068284, at 3 (Attached as RN “Exhibit B”).) The
28 additional time allotted by the new Permit to achieve compliance with RWLs, required in the 2001
Permit, for Permittees developing a WMP or an EWMP constitutes a less stringent limitation.

⁴⁶ See also, U.S. EPA (September 2010) NPDES Permit Writers’ Manual (“NPDES Manual), at 7-
1 to 7-3. (Attached as RN “Exhibit C”).

1 In addition, the RWLs constitute “standards” or “conditions” protected by anti-backsliding
2 requirements under 40 C.F.R. § 122.44(l). Board staff have attempted to avoid the plain
3 implications of section 402(o) by saying that the CWA “talks about [anti-backsliding] in terms of
4 effluent limits. And we’re talking about receiving water limitations.”⁴⁷ Yet, even if this were the
5 case, the safe harbors would still be unlawful. EPA’s anti-backsliding regulations require that
6 “effluent limitations, *standards or conditions* must be at least as stringent as the final effluent
7 limitations, *standards, or conditions* in the previous permit. . . .” (40 C.F.R. § 122.44(l)(1)
8 (emphasis added).) Thus these requirements “apply to questions regarding non-water quality-
9 based effluent limits,” including “backsliding questions regarding permit conditions, (rather than
10 permit limitations) even where the conditions in question are based on water quality
11 considerations.”⁴⁸ Regional Board staff confirmed at the November 8 Hearing that, at a minimum,
12 the “receiving water limits would be considered a condition[] [of the] permit.”⁴⁹ As a result, even
13 if section 402(o) were inapplicable, which it is not, the prohibition on anti-backsliding contained in
14 40 CFR 122.44(l) applies to the RWLs as conditions. Because in either case the 2012 Permit
15 weakens the Receiving Water Limitations as compared with the 2001 Permit, it violates anti-

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17
18 ⁴⁷ Ms. Deborah Smith, Regional Board, November 8 Hearing at 313:5-7.

19 ⁴⁸ EPA (1989) Memorandum on Interim Guidance on Implementation of Section 402(o) Anti-
20 Backsliding Rules For Water Quality-Based Permits, from James R. Elder, Director, Office of
21 Water Enforcement and Permits to Water Management Division Directors, Regions I-X, NPDES
22 State Directors, at 2. (Attached as RN “Exhibit D”). (“Section 402(o) is silent on the issue of
23 permit conditions, and only addresses backsliding from permit limitations”); See also, EPA (Sept.
24 2010) NPDES Permit Writers’ Manual, EPA 833-K-10-001, at 7-4. (“NPDES Manual”)

25 ⁴⁹ Ms. Deborah Smith, Regional Board, November 8 Hearing, at 314:6-7. Earlier draft versions of
26 the Permit had previously acknowledged the application of anti-backsliding requirements in this
27 context, but, inexplicably, staff edited the October 18, 2012 draft of the 2012 Permit to remove
28 reference to “conditions” in its explanation of anti-backsliding requirements. Referring to 40
C.F.R. § 122.44(l), the sentence “anti-backsliding provisions require effluent limitations or other
conditions in a reissued permit to be as stringent as those in the previous permit,” was revised to
read “anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent
as those in the previous permit. . . .” (2012 Permit, at p. 25, Finding N.) Thus, the Permit only
incompletely states the requirements of federal anti-backsliding regulations it then proceeds to
violate.

1 backsliding requirements. In addition, as discussed below, the exemptions to anti-backsliding do
2 not apply here.

3 **ii. The Safe Harbors do not Qualify Under Section 1313(d)(4) as**
4 **Exceptions to the Anti-Backsliding Rule**

5 Section 1313(d)(4) restricts what effluent limitations may be revised in a renewal permit.
6 First, where water quality standards are not being attained (see 33 U.S.C. § 1313(d)(4)(A)), a less
7 stringent effluent limitation based on a TMDL or other WLA is allowed in a renewal permit only if
8 “the cumulative effect of all such revised effluent limitations based on such total maximum daily
9 load or waste load allocation will assure the attainment of such water quality standard,” or if the
10 designated use is removed. (33 U.S.C. § 1313(d)(4)(A).)⁵⁰ Second, for waters that are meeting
11 applicable water quality standards, (under 33 U.S.C. § 1313(d)(4)(B)), a limitation based on a
12 TMDL or Water Quality Standard may only be weakened if it is consistent with the applicable
13 state antidegradation policy. (33 U.S.C. § 1342(o)(1).)⁵¹

14 Neither of these conditions has been met. First, for waters that are failing to meet WQSs,
15 the 2012 Permit fails to demonstrate that the revised standards will assure WQSs will be attained.
16 Second, where waters are currently attaining WQSs, the Permit fails to provide required analysis
17 consistent with the state’s antidegradation policy. These allowances violate the anti-backsliding
18 requirements both during WMP or EWMP development, before the plan is approved by the
19 Regional Board, and after WMP or EWMP approval, during the plan’s implementation.

20 **iii. The Safe Harbors do not Qualify Under Section 402(o)(2) as**
21 **Exceptions to the Anti-Backsliding Rule**

22 Although section 402(o)(2) lists a series of exceptions to the otherwise applicable anti-
23 backsliding requirements, none applies to this permit. The law’s exemptions include:
24
25

26 _____
27 ⁵⁰ See also, EPA, NPDES Permit Writer’s Manual, at 7-3.

28 ⁵¹ See also, EPA, NPDES Manual, at 7-2; Exhibit 7-2. For further discussion of antidegradation
issues raised by the 2012 Permit, see section III.A.3, below.

1 (A) material and substantial alterations or additions to the permitted facility
2 occurred after permit issuance which justify the application of a less stringent
3 effluent limitation; (B)(i) information is available which was not available at the
4 time of permit issuance . . . and which would have justified the application of a less
5 stringent effluent limitation at the time of permit issuance; or (ii) the Administrator
6 determines that technical mistakes or mistaken interpretations of law were made in
7 issuing the permit under section (a)(1)(B) of this section; (C) a less stringent
8 effluent limitation is necessary because of events over which the permittee has no
control and for which there is no reasonably available remedy; (D) the permittee
has received a permit modification under [various other sections] of this title; or (E)
the permittee has installed the treatment facilities required to meet the effluent
limitations in the previous permit and has properly operated and maintained the
facilities but has nevertheless been unable to achieve the previous effluent
limitations. . .

9 (33 U.S.C. § 1342(o)(2).) None of these exceptions apply to the adoption of the 2012 Permit.

10 Other than an unsupported and insufficient statement by Board counsel at the November 8 Hearing
11 that “Had in 2001 there been 33 [new] TMDLs [incorporated into the Permit] it’s possible the
12 Board might have done something very different than what they did” in adopting the 2001 Permit,
13 the Regional Board offered no evidence that these exceptions apply.⁵² As a result, the anti-
14 backsliding requirements of section 402(o) prohibit the adoption of safe harbors in the 2012
15 Permit.

16 **iv. The Safe Harbors Violate Section 402(o)(3)’s Prohibition**
17 **Against Changes that Would Result in a Violation of**
18 **Applicable Water Quality Standards**

19 Even if the 2012 Permit’s safe harbors complied with the above anti-backsliding
20 requirements, which they do not, they would still be unlawful under section 402(o)(3), which
21 serves as a “*safety clause* that provides an absolute limitation on backsliding.”⁵³ Section 402(o)(3)
22 requires that in no event shall a permit “be renewed, reissued, or modified to contain a less
23 stringent effluent limitation if the implementation of such limitation would result in a violation of a
24 water quality standard” under 33 U.S.C. § 1313. (33 U.S.C. § 1342(o)(3).) Thus, as EPA
25 explains, “even if one or more of the backsliding exceptions outlined in the statute is applicable
26 and met, CWA section 402(o)(3) acts as a floor and restricts the extent to which effluent

27 ⁵² Ms. Jennifer Fordyce, Regional Board Counsel, November 8 Hearing at 317:11-13.

28 ⁵³ See EPA, NPDES Manual at 7-4.

1 limitations may be relaxed.”⁵⁴ The 2012 Permit, by explicitly excusing violations of Receiving
2 Water Limitations which prohibit discharges that cause or contribute to a violation of WQSs, fails
3 to meet this federally mandated minimum level of protection.

4 **3. The 2012 Permit’s Safe Harbor Provisions Violate State and Federal** 5 **Antidegradation Requirements**

6 The overall goal of the Clean Water Act is the complete elimination of the discharge of
7 pollutants into waters of the United States. (33 U.S.C. § 1251(a)(1).) To help meet this goal,
8 states must implement an antidegradation policy. As discussed below, the permit does not comply
9 with applicable antidegradation requirements.

10 **a. The Safe Harbors Violate Antidegradation Requirements that Prohibit** 11 **Actions that Would Lead to Lower Water Quality**

12 The federal antidegradation policy contains a three “Tier” test for determining when
13 increases in pollutant loadings or adverse changes to water quality may be allowed. (40 C.F.R. §
14 131.12.) While Tier II and Tier III apply only to high quality waters and “outstanding National
15 resource waters,” respectively, Tier I antidegradation analysis applies to *all* waters of the United
16 States, including waters that do not exceed the CWA section 101(a) goals.⁵⁵ “Tier One
17 classification applies a minimum level of protection to all waters, which protects even seriously
18 degraded water bodies, by prohibiting any additional pollution that would affect existing uses.”⁵⁶

19 California has established a state antidegradation policy, which incorporates the federal
20 antidegradation policy and establishes additional requirements.⁵⁷ NPDES permit renewals or
21 modifications such as the 2001 and 2012 Los Angeles County MS4 Permits are subject to both
22

23
24 ⁵⁴ See EPA, NPDES Manual at 7-4.

25 ⁵⁵ (64 Fed. Reg. 46058, 46063, *Revisions to the National Pollutant Discharge Elimination System*
26 *Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality*
27 *Planning and Management Regulation.*

28 ⁵⁶ Brawer, J.M., “Antidegradation Policy and Outstanding Natural Resource Waters in the
Northern Rocky Mountain States,” 20 Pub. Land & Resources L. Rev. 13, 18 (1999).

⁵⁷ See, State Board Resolution 68-16; *see also In the Matter of the Petition of Rimmon C. Fay*,
State Board Order No. WQ 86-17 at 16-19 (November 20, 1986).

1 state and federal antidegradation requirements.⁵⁸ The State antidegradation policy specifically
2 addresses only “high quality” waters, or waters of better quality than required by water quality
3 standards for a particular beneficial use (or conversely, those waters not designated as “impaired”).
4 However, the State policy applies to all waters, including surface and groundwater, to changes in
5 water quality since 1968, and to all uses, including existing and potential uses.⁵⁹

6 Together, state and federal anti-degradation requirements mandate that existing water
7 quality in navigable waters be maintained, unless degradation is justified based on specific
8 findings. In no case may water quality be lowered to a level that would interfere with existing or
9 designated uses. Thus any action by a Regional Board, including permit issuance, that would result
10 in lower water quality—either in high quality or impaired waters—must be analyzed to ensure
11 consistency with state and federal antidegradation policy. Further, because a receiving water can
12 be considered high quality for one beneficial use, and impaired for others, the analysis must be
13 conducted pollutant by pollutant, and beneficial use by beneficial use. (*See, Asociacion de Gente*
14 *Unida for El Agua v. Central Valley Regional Board* (2012) (210 Cal.App.4th 1255) [149
15 Cal.Rptr.3d 132, 142; 144] (citing “St. Water Res. Control Bd., Guidance Memorandum (Feb. 16,
16 1995); 40 CFR 131.12(a)(1).)

17 Accordingly, the Regional Board was required to conduct a Tier I analysis for all waters
18 impacted by the Los Angeles County MS4 systems, and a Tier II analysis for higher quality Los
19 Angeles waters (taking account of water quality for specific pollutant and beneficial use
20 considerations). In past instances when the Regional Board has failed to provide adequate findings
21 to verify that beneficial uses or high-quality waters will be maintained, the State Board has
22 remanded the orders to the Regional Board for further proceedings.⁶⁰ The same should be done
23 here.

24 _____
25 ⁵⁸ See, SWRCB Order No. WQ 86-17; EPA, Region IX, *Guidance on Implementing the*
26 *Antidegradation Provisions of 40 C.F.R. § 131.12*, at 2-4 (June 3, 1987) (“EPA Antidegradation
27 Guidance”). (Attached as RN “Exhibit E”.)

28 ⁵⁹ State Board Resolution 68-16.

⁶⁰ See e.g., State Board Order WQ 86-17, at 28 (State Board remanded Regional Board order due
to the Regional Board’s failure to make appropriate findings as to whether an increase in

1 **b. The Regional Board did not Conduct Any Required Antidegradation**
2 **Analysis**

3 As noted in section III.A.1. above, the safe harbor provisions in the 2012 Permit weaken
4 the Receiving Water Limitations compared with the 2001 Permit requirements.⁶¹ However,
5 despite the 2012 Permit’s explicit weakening of the prior permit’s limits, and the resulting
6 continued degradation of receiving waters, the Regional Board conducted *no* antidegradation
7 analysis. The 2012 Permit’s reference to antidegradation is limited to a cursory summary of the
8 legal requirements, and a conclusion that “[t]he permitted discharge is consistent with the anti-
9 degradation provision of [40 CFR] section 131.12 and State Water Board Resolution No. 68-16.”
10 (2012 Permit, at p. 25, Finding J.) Simply claiming that no degradation will occur does not satisfy
11 the requirements of the Clean Water Act. (*Asociacion de Gente Unida*, 149 Cal.Rptr., at 136.; see
12 also, *American Funeral Concepts-American Cremation Soc’y v. Board of Funeral Directors and*
13 *Embalmers* (1982) 136 Cal.App.3d 303, 309.)

14 Even assuming, as the Regional Board claims, that the new Receiving Water Limitations
15 are as stringent as those in the previous Permit, allowing a permit regime that degrades receiving
16 waters to continue triggers antidegradation analysis. At a minimum, the 2012 Permit maintains the
17 existing failed program implementation for 18 or 30 months during WMP or EWMP development
18 and a potentially additional 10 months during Regional Board review of the plans. Such an
19 approach is inconsistent with antidegradation requirements. As the Third Appellate District
20

21 suspended solids and bacteria would violate antidegradation requirements in an area used for
22 body-contact sports.); see also, *Topanga Ass’n for a Scenic Cmty.*, 11 Cal.3d at 515

23 ⁶¹ Board counsel indicated that anti-degradation is not a concern during the planning phase for
24 either WMP or EWMPs, before the plans are either approved or adopted, because “they still have
25 to implement their existing MS4 program. So they’re going to keep doing what they’re doing right
26 now . . . the water quality is not going to get worse.” (Ms. Jennifer Fordyce, Regional Board
27 counsel, November 8 Hearing, at 318:3-7; see also Ms. Renee Purdy, Regional Board, November 8
28 Hearing, at 318:12-18.) Yet as discussed earlier, under the existing program, monitoring shows
persistent violations of water quality standards, including in waters not yet listed as impaired under
CWA section 303(d).

1 pointedly stated in rejecting the Regional Board’s argument that because a new dairy permit was
2 no worse than the last:

3 Our problem with the Regional Board’s reliance on the assertion that no
4 groundwater degradation is allowed is twofold. First, as the order itself recognizes,
5 the groundwater quality has degraded, and dairy operations are partly responsible.
6 To the extent that the Order allows historic practices to continue without change,
7 degradation will continue.

8 (*Asociacion de Gente Unida*, 149 Cal.Rptr., at 145.)

9 There is no meaningful debate that urban runoff continues to degrade receiving waters in
10 the Los Angeles area, and that the stormwater programs implemented under the prior permit failed
11 to control that degradation. Therefore, because an antidegradation analysis is required, and the
12 2012 Permit fails to conduct that analysis, the 2012 Permit violates State and Federal Law.

13 **B. The Permit Unlawfully Fails to Incorporate Waste-Load Allocations Consistent With
14 Applicable TMDLs**

15 The Clean Water Act relies on TMDLs to restore water bodies that fail to meet water
16 quality standards. TMDLs establish a clear and scientifically-driven pathway towards protecting
17 beneficial issues for public health and aquatic life. The CWA and its implementing regulations
18 require that NPDES permits are consistent with the assumptions and requirements of TMDL
19 WLAs. (40 C.F.R. § 122.44(d)(1)(vii)(B).)⁶²

20 Consistent with EPA regulations, the MS4-related WLAs for TMDLs adopted in the Los
21 Angeles Region must be properly reflected in the MS4 Permit. The Permit itself states:

22 The Permittees shall comply with the applicable water quality-based effluent
23 limitations and/or receiving water limitations contained in Attachments L through
24 R, consistent with the assumptions and requirements of the WLAs established in
25 the TMDLs, including implementation plans and schedules, where provided for in
26 the State adoption and approval of the TMDL (40 CFR §122.44(d)(1)(vii)(B);
27 Cal.Wat. Code §13263(a)).

28 (2012 Permit, at Part VI.E.1.c.) However, the Permit fails to properly incorporate the very
29 limitations it acknowledges are necessary. During this renewal, 33 TMDLs were newly
30 incorporated into the 2012 Permit. In violation of the federal requirements, the 2012 Permit fails

⁶² See, EPA Hanlon Memo.

1 to ensure compliance with all interim and final WLAs for these TMDLs and incorporates illegal
2 compliance schedules as permit terms.

3 **1. The 2012 Permit Illegally Exempts Dischargers from Complying with**
4 **Interim and Final Numeric Waste Load Allocations Established in TMDLs**

5 Although all permit terms must be consistent with the assumptions and requirements of
6 WLAs established in TMDLs, (40 C.F.R. § 122.44(d)(1)(vii)(B)), the 2012 Permit inexplicably
7 excuses compliance with interim WLAs⁶³ and eliminates final WLAs in at least two instances.

8 First, the 2012 Permit specifies that where a Permittee is implementing an EWMP and
9 runoff is retained up to the 85th percentile storm, the Permittee is deemed in compliance with final
10 TMDL WLAs. (2012 Permit, at Part VI.E.2.e.i(4).) The Permit states:

11 A Permittee shall be deemed in compliance with an applicable final water quality-
12 based effluent limitation and final receiving water limitation for the pollutant(s)
13 associated with a specific TMDL if... (4)In drainage areas where Permittees are
14 implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up
to and including the volume equivalent to the 85th percentile, 24-hour event is
retained for the drainage area tributary to the applicable receiving water.

15 (*Id.* at Part VI.E.2.e.i.) By providing this alternative means of demonstrating compliance, the
16 Regional Board thus creates a safe harbor from final TMDL requirements and incorporates a
17 provision that is inconsistent with the WLAs. Under this regime, there is no assurance that actual
18 final TMDL limits, established to achieve WQSs and protect beneficial uses, will ever be met in
19 waterbodies throughout Los Angeles County.⁶⁴

20 Second, for EPA-approved TMDLs, the 2012 Permit removes compliance obligations,
21 again excusing Permittees from complying with final WLAs. Section VI.E.3 provides:
22
23
24

25 ⁶³ Where a Permittee engages in either type of watershed management program, the Permit
26 unlawfully eliminates the need to comply with interim WQBELs and RWLs. Indeed, the Permit
27 includes a safe harbor for violations of interim limits that occur during and after WMP or EWMP
development rather than actually achieving the interim limits defined in the TMDL. (2012 Permit,
at Parts VI.C.3.a, VI.E.2.d.i(4), (4)(d); see also, Section I.B.2., above.)

28 ⁶⁴ See discussion on evidence in the record in section III.C., below.

1 TMDLs established by the USEPA, to which Permittees are subject, do not contain
2 an implementation plan adopted pursuant to California Water code section 13424.
3 However, USEPA has included implementation *recommendations* as part of these
4 TMDLs. *In lieu of* inclusion of numeric water quality based effluent limitations at
5 (2012 Permit, at Part VI.E.3 (emphasis added).) This provision is not consistent with existing,
6 applicable WLAs. (40 C.F.R. § 122.44(d)(1)(vii)(B).) Because TMDLs established by EPA
7 include numeric WLAs, the 2012 Permit must include numeric WQBELs consistent with those
8 WLAs.⁶⁵ For example, the San Gabriel River Metals and Selenium TMDL, which has been in
9 effect since 2007, sets numeric WLAs based on the California Toxics Rule (“CTR”) (40 C.F.R.
10 131.36(d)(10)) criteria. The MS4 Permit must incorporate the numeric WLAs set forth in the EPA
11 San Gabriel River Metals and Selenium TMDL and other EPA TMDLs to comply with the Clean
12 Water Act. Yet, the safe harbor provisions do not require compliance with these numeric limits, in
13 violation of federal requirements.

14 **2. The Permit Incorporates Illegal Compliance Schedules In Violation of 40**
15 **C.F.R. § 122.47**

16 NPDES permits may only include schedules for achieving compliance with permit limits as
17 permit terms when schedules for achieving compliance are authorized, appropriate, and satisfy
18 specific requirements. (*See In the Matter of Star-Kist Caribe, Inc.* (E.A.B. 1989) 1989 EPA App.
19 LEXIS 38, at *7; 33 U.S.C. § 1313(e)(3)(F); 40 C.F.R. § 122.47.)

20 Any compliance schedules incorporated into the MS4 Permit must lead to compliance “as
21 soon as possible,” (40 C.F.R. § 122.47(a)(1)), and must comply with specific requirements
22 including:

- 23 1) if the compliance schedule exceeds one year, it must include interim compliance
24 deadlines; 2) interim deadlines must be no more than one year apart; and, 3) if the
25 time necessary for completion of any interim requirement is more than one year and
26 is not readily divisible into stages for completion, the permit shall specify interim
27 dates for the submission of reports of progress toward completion of the interim
28 requirements and indicate a projected completion date.

28 ⁶⁵ EPA Hanlon Memo

1 (40 C.F.R. § 122.47(a)(3).) Further, WLAs and compliance schedules in the 2012 Permit must
2 also be consistent with other state water quality control plans and statutory deadlines; a compliance
3 schedule may only be included in an NPDES permit as a permit term when such compliance
4 schedules are authorized. (See *In the Matter of Star-Kist Caribe, Inc.*, 1989 EPA App. LEXIS, at
5 *7; 33 U.S.C. § 1313(e)(3)(F).)

6 Section IV.A.2.a. of the 2012 Permit does not comply with these federal regulations. It
7 provides that “[e]ach Permittee shall comply with applicable WQBELs as set forth in Part VI.E
8 [TMDL section] of this Order, *pursuant to applicable compliance schedules.*” (Emphasis added).
9 The 2012 Permit also references TMDL implementation schedules in several other sections.⁶⁶
10 However, the implementation schedules set out in several of the applicable TMDLs do not satisfy
11 federal laws governing NPDES permit compliance schedules, and therefore cannot be incorporated
12 into the 2012 Permit.

13 Specifically, any implementation schedule set forth in an applicable TMDL that allows for
14 more than one year to achieve compliance, but lacks interim deadlines, cannot be incorporated into
15 the 2012 Permit as an NPDES compliance schedule. Because the implementation schedules set
16 out in the Malibu Creek Bacteria TMDL, the Santa Monica Bay Beaches Bacteria TMDLs, and the
17 Los Angeles River Indicator Bacteria TMDL do not have such deadlines, the 2012 Permit may not
18 incorporate them without a detailed schedule. The Permit contains no such schedule.

19 Moreover, WLAs in metals TMDLs in Los Angeles are based on the CTR criteria, and
20 compliance schedules for CTR-based limits are authorized through the Inland Surface Water Plan
21 (“ISWP”). But the ISWP only authorized compliance schedules for a maximum of 10 years from
22 the time CTR criteria were first promulgated and states that no discharger can be given a
23 compliance schedule to meet CTR criteria after May 18, 2010.⁶⁷ As a result, any compliance
24 schedules set out in TMDLs implementing the CTR are not authorized.

25
26 ⁶⁶ See, e.g., Permit, at Parts VI.C.3.c.; VI.E.1.; VI.E.c.ii.; and, VI.e.2.d.i.

27 ⁶⁷ State Board Resolution No. 2000-15, *Policy for the Implementation of Toxics Standards for*
28 *Inland Surface Waters, Enclosed Bays, and Estuaries of California*, at 19; see also October 23,
2006 EPA Letter re: California SIP, Compliance Schedule Provisions; State Board Memo dated

1 **C. The Decision to Adopt the 2012 Permit, Including its Safe Harbor Provisions, is not**
2 **Supported by the Findings or the Evidence in the Administrative Record**

3 The Regional Board’s approval of the 2012 Permit violates long-established requirements
4 for agency decision-making. The Regional Board’s findings fail to show the Board’s mode of
5 analysis to “bridge the analytic gap between the raw evidence and [the] ultimate decision or
6 order.” (*See, Topanga Ass’n for a Scenic Cmty*, 11 Cal.3d at 515.) Moreover, in critical aspects
7 the Regional Board’s final decision lacks evidentiary support in the record. The absence of
8 adequate findings or evidence renders the Regional Board’s decision unlawful. (*See, Cal. Civ.*
9 *Proc. Code § 1094.5(b); see also, Zuniga*, 137 Cal. App. 4th at 1258.)

10 The 2012 Permit’s discussion of anti-backsliding requirements exemplifies the Regional
11 Board’s lack of sufficient analysis.⁶⁸ Environmental Groups raised significant legal and factual
12 argument before the Regional Board to demonstrate that the safe harbors incorporated in the 2012
13 Permit violate federal anti-backsliding requirements.⁶⁹ In response, the 2012 Permit merely
14 repeats (incompletely) the legal requirements for anti-backsliding, then leaps to the conclusory
15 statement that, “All effluent limitations in this Order are at least as stringent as the effluent
16 limitations in the previous permit.” (2012 Permit, at p. 25, Finding N.) However, bare
17 conclusions are impermissible. (*See, American Funeral Concepts-American Cremation Soc’y*, 136
18 *Cal.App.3d at 309 (“administrative findings set forth solely in the language of the applicable*
19 *legislation are insufficient”).*)

20 Similarly, there is insufficient evidence to support the Regional Board’s decision to adopt
21 the safe harbor provisions allowed for Permittees under an EWMP. Participation in an EWMP
22

23 September 15, 2006 Re: CTR Compliance Schedules; State Board Resolution No. 2008-0025 at 4;
24 Final Staff Report, State Board Resolution No. 2008-0025 at 10; Final Response to Written
25 Comments, State Board Resolution No. 2008-0025 at 6, 9, 10, 18-19, 26.

26 ⁶⁸ As is discussed in section III.A.3.b., the 2012 Permit’s discussion of antidegradation
27 requirements is another stark example of the lack of sufficient findings and evidentiary support.

28 ⁶⁹ See Letter from NRDC, Los Angeles Waterkeeper, and Heal the Bay to Regional Board re:
Comments on Tentative Order R4-2012-XXXX, Los Angeles County MS4 Permit, June 6, 2012
Draft, July 23, 2012; NRDC, Los Angeles Waterkeeper and Heal the Bay also presented on this
issue at the October 4-5 and November 8 Regional Board Hearings on the 2012 Permit.

1 requires retention of runoff from the 85th percentile, 24-hour storm in exchange for safe harbors.
2 (Permit, at Part VI.E.2.e.i.(4).) Yet there is no evidence in the record for the 2012 Permit’s
3 adoption to demonstrate that retention of the 85th percentile storm event will, in fact, achieve
4 compliance with either Water Quality Standards required under the Receiving Water Limitations,
5 or with the numerous TMDL WLAs required to be met in the 2012 Permit. At the November 8,
6 2012 Hearing, EPA specifically questioned the adequacy of the record on this point:

7 [T]he EPA guidance on incorporating TMDLs into . . . MS4 permits that has been
8 around since 2002 talks about when you come up with a BMP-based approach for
9 incorporating a TMDL into a permit—so basically this is a BMP-based approach.
10 You would be retaining the 85th percentile storm—you have to have in the record
11 for the permit the justification for how that gets to those specific wasteload
12 allocations. . . .⁷⁰

13 We’ve been very involved with the county’s modeling and . . . we don’t have that
14 rigorous analysis that’s been—that’s required by the EPA guidance for saying and
15 showing that that specific retention is going to achieve the numeric wasteload
16 allocation. . . . I haven’t seen the support in the administrative record, the fact sheet
17 or otherwise.⁷¹

18 Following EPA’s observation, the Regional Board Chair asked staff directly if the evidence
19 requested by EPA was in the record.⁷² The Board’s Executive Officer, Mr. Unger replied:

20 Yes. Yes. It was discussed when the county first presented at the last hearing, the
21 enhanced management approach, they discussed their—the watershed modeling
22 system that they would be using to demonstrate a reasonable assurance.⁷³

23 However, the record, including watershed modeling discussed by Los Angeles County, does not
24 anywhere demonstrate that retention of the 85th percentile storm will protect water quality
25 standards or achieve TMDL WLAs as required by the Clean Water Act or EPA guidance.

26 In fact, the County’s presentation demonstrates only that, in its view, the 85th percentile
27 storm represents a cost-effective or “appropriate design storm [size] for use in BMP planning and
28 design” for treatment of stormwater runoff,⁷⁴ not, as Regional Board staff appear to indicate, that

⁷⁰ Mr. John Kemmerer, EPA, November 8 Hearing, at 365:24-25 to 366:1-7.

⁷¹ Mr. John Kemmerer, EPA, November 8 Hearing, at 366:10-18; 367:6-8.

⁷² See, Ms. Maria Mehranian, Regional Board Chair, November 8 Hearing, at 368:13-14 (stating
“So—I’m sorry . . . it is in the record?”).

⁷³ Mr. Sam Unger, at 368:15-19.

⁷⁴ Mr. Gary Hildebrand, November 8 Hearing, at 220: 18-19.

1 retention of the 85th percentile storm will achieve required WLAs for all TMDLs in all watersheds
2 covered by the permit. At both the October 4-5 Hearing and November 8 Hearing, the County
3 discussed the decision to select the 85th percentile storm and acknowledged it was based on cost
4 and treatment considerations:

5 This concept involves the identification of a storm of specific size, the intensity,
6 and/or duration for use in design stormwater controls to achieve water quality
standards that balances cost with pollutant removal efficiency. . . .⁷⁵

7 The [projected] graph plots the total cost of BMPs needed throughout LA County to
8 comply with all the TMDLs expected in the new permit against various size storm
9 events. As can be seen, the most optimum storm size is the 85th percentile storm
event.⁷⁶

10 Thus, the County’s explanation does not demonstrate a discernible relationship between the
11 85th percentile retention approach and full achievement of TMDL WLAs—just that the 85th
12 percentile storm is a cost-effective cut-off point for pollution control measures.⁷⁷ Nor do
13 the County or the Regional Board provide data, analysis, or in the Regional Board’s case,
14 findings to support that this BMP-based approach will achieve applicable WLAs⁷⁸ or
15 demonstrate the validity of the County’s model.⁷⁹ Accordingly, the Regional Board’s

17
18 ⁷⁵ Mr. Gary Hildebrand, November 8 Hearing, at 220: 20-24. Regional Board Staff also
19 indicated their understanding that selection of the 85th percentile storm was a cost
20 consideration, not an independent assessment of the storm size required to be retained to
21 meet applicable TMDL WLAs. See, Mr. Sam Unger, November 8 Hearing, at 360:14-17
22 (“when you look at that curve, sort of a dollars versus precipitation event occurred, right
23 about that 85th percentile—right at the 85th percentile, the curve trends up very markedly.”).

24 ⁷⁶ Mr. Gary Hildebrand, October 4 Hearing, at 308:7-12.

25 ⁷⁷ The same concern rises for compliance with the Permit’s Receiving Water Limitations—
26 retention of the 85th percentile storm represents only, in the County’s view, a cost effective upper
27 limit for a design storm. This does not stand for the proposition that retention will then achieve
28 water quality standards for all receiving waters in all conditions.

⁷⁸ 40 C.F.R. § 122.44(d)(1)(vii)(B); see also, EPA Hanlon Memo.

⁷⁹ We note that to the extent the Regional Board may have relied on additional information
submitted by the County related to selection of the 85th percentile storm submitted after July 23,
this evidence is not part of the record. In the agenda for the October 4-5 and the November 8
Hearings, the Regional Board stated unequivocally that “No new written materials may be
submitted on the Tentative Order . . . Written comments were due by noon on July 23, 2012.”
(October 4-5 Agenda, at, 2; see also, Notice of Opportunity for Comment, October 18, at 2.

1 decision to include the EWMP safe harbors in the 2012 Permit was arbitrary and
2 capricious.

3
4 **IV. CONCLUSION**

5 For all the foregoing reasons, the instant Petition for Review should be GRANTED.

6
7 Respectfully submitted,

8 Dated: December 10, 2012

NATURAL RESOURCES DEFENSE COUNCIL, INC.

9
10 

11 _____
12 Noah Garrison
13 Steve Fleischli
14 Attorneys for NATURAL RESOURCES
DEFENSE COUNCIL, INC. & HEAL THE BAY

15 Dated: December 10, 2012

LOS ANGELES WATERKEEPER

16 

17 _____
18 Elizabeth Crosson
19 Tatiana Gaur
20 Attorneys for LOS ANGELES WATERKEEPER
& HEAL THE BAY

1 **PROOF OF SERVICE**

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18
3 and not a party to the within action. My business address is: 1314 Second Street, Santa Monica,
4 California 90401.

5 On December 10, 2012 I served the within document described as MEMORANDUM OF
6 POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW OF LOS
7 ANGELES REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING
8 ORDER NO. R4-2012-0175 on the following interested parties in said action by placing a true
9 copy thereof in the United States mail enclosed in a sealed envelope with postage prepaid,
10 addressed as follows:

11 Ken Berkman
12 City Engineer
13 30001 Ladyface Court
14 Agoura Hills, CA 91301

11 Terri Rodrigue
12 City Engineer
13 6330 Pine Avenue
14 Bell, CA 90201-1291

15 David Dolphin
16 111 South First Street
17 Alhambra, CA 91801-3796

15 John Oropeza
16 Director of Public Works
17 7100 South Garfield Avenue
18 Bell Gardens, CA 90201-3293

19 Susannah Turney
20 Environmental Services Officer
21 P.O. Box 60021
22 Arcadia, CA 91066-6021

19 Bernie Iniguez
20 Environmental Services Manager
21 16600 Civic Center Drive
22 Bellflower, CA 90706-5494

23 Maria Dadian
24 Director of Public Works
25 18747 Clarkdale Avenue
26 Artesia, CA 90701-5899

23 Vincent Chee
24 Project Civil Engineer
25 455 North Rexford Drive
26 Beverly Hills, CA 90210

27 Carl Hassel
28 City Engineer
213 East Foothill Boulevard
Azusa, CA 91702

27 Elroy Kiepke
28 City Engineer
600 Winston Avenue
Bradbury, CA 91010-1199

29 David Lopez
30 Associate Engineer
31 14403 East Pacific Avenue
32 Baldwin Park, CA 91706-4297

29 Bonnie Teaford
30 Public Works Director
31 P.O. Box 6459
32 Burbank, CA 91510

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Alex Farassati
ESM
100 Civic Center Way
Calabasas, CA 91302-3172

Mike O'Grady
Environmental Services
P.O. Box 3130
Cerritos, CA 90703-3130

Gina Nila
2535 Commerce Way
Commerce, CA 90040-1487

Vivian Castro, Environmental Services
Manager
125 East College Street
Covina, CA 91723-2199

Damian Skinner
Manager
9770 Culver Boulevard
Culver City, CA 90232-0507

Yvonne Blumberg
P.O. Box 7016
Downey, CA 90241-7016

James A Enriquez
Director of Public Works
P.O. Box 6008
El Monte, CA 91731

Ron Jackson
Building Maintenance Supervisor
P.O. Box 47003
Gardena, CA 90247-3778

Dave Davies
Deputy Director of Public Works
116 East Foothill Boulevard
Glendora, CA 91741

Patricia Elkins
Building Construction Manager
P.O. Box 6234
Carson, CA 90745

Craig Bradshaw
City Engineer
207 Harvard Avenue
Claremont, CA 91711-4719

Hien Nguyen
Assistant City Engineer
205 South Willowbrook Avenue
Compton, CA 90220-3190

Hector Rodriguez
City Manager
P.O. Box 1007
Cudahy, CA 90201-6097

David Liu
Director of Public Works
21825 East Copley Drive
Diamond Bar, CA 91765-4177

Steve Esbenshades
Engineering Division Manager
1600 Huntington Drive
Duarte, CA 91010-2592

Stephanie Katsouleas
Public Works Director
350 Main Street
El Segundo, CA 90245-3895

Maurice Oillataguerre
Senior Environmental Program Scientist
Engineering Section
633 East Broadway, Room 209
Glendale, CA 91206-4308

Joseph Colombo
Director of Community Development
21815 Pioneer Boulevard
Hawaiian Gardens, CA 90716

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Arnold Shadbehr
Chief General Service and Public Works
4455 West 126th Street
Hawthorne, CA 90250-4482

Kimberly Colberts
Environmental Coordinator
6165 Spring Valley Road
Hidden Hills, CA 91302

Mike Nagaoka
Director of Public Safety
P.O. Box 3366
Industry, CA 91744-3995

Kwok Tam
Director of Public Works
5050 North Irwindale Avenue
Irwindale, CA 91706

Shauna Clark
City Manager
1245 North Hacienda Boulevard
La Habra Heights, CA 90631-2570

John DiMario
Director of Development Services
15900 East Marin Street
La Puente, CA 91744-4788

Konya Vivanti
P.O. Box 158
Lakewood, CA 90714-0158

Tom A. Odom
City Administrator
P.O. Box 339
Lomita, CA 90717-0098

Josef Kekula
11330 Bullis Road
Lynwood, CA 90262-3693

Homayoun Behboodi
Associate Engineer
1315 Valley Drive
Hermosa Beach, CA 90254-3884

Craig Melich
City Engineer and City Official
6550 Miles Avenue
Huntington Park, CA 90255

Lauren Amimoto
Senior Administrative Analyst
1 W. Manchester Blvd, 3rd Floor
Inglewood, CA 90301-1750

Edward G. Hitti
Director of Public Works
1327 Foothill Boulevard
La Canada Flintridge, CA 91011-2137

Steve Forster
Public Works Director
13700 La Mirada Boulevard
La Mirada, CA 90638-0828

Daniel Keeseey
Director of Public Works
3660 "D" Street
La Verne, CA 91750-3599

Marlene Miyoshi
Senior Administrative Analyst
14717 Burin Avenue
Lawndale, CA 90260

Shahram Kharaghani
Program Manager
1149 S. Broadway, 10th Floor
Los Angeles, CA 90015

Jennifer Brown
Environmental Program Analyst
23825 Stuart Ranch Road
Malibu, CA 90265-4861

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Brian Wright
Water Supervisor
1400 Highland Avenue
Manhattan Beach, CA 90266-4795

Heather Maloney
415 South Ivy Avenue
Monrovia, CA 91016-2888

Amy Ho
John Hunter (Consultant)
320 West Newmark Avenue
Monterey Park, CA 91754-2896

Allan Rigg
Director of Public Works
340 Palos Verdes Drive West
Palos Verdes Estates, CA 90274

Stephen Walker
P.O. Box 7115
Pasadena, CA 91109-7215

Julie Carver
Environmental Programs Coordinator
P.O. Box 660
Pomona, CA 91769-0660

Mike Shay
Principal Civil Engineer
P.O. Box 270
Redondo Beach, CA 90277-0270

Greg Grammer
Assistant to the City Manager
4045 Palos Verdes Drive North
Rolling Hills Estates, CA 90274

Latoya Cyrus
Environmental Services Coordinator
245 East Bonita Avenue
San Dimas, CA 91773-3002

Andre Dupret
Project Manager
4319 East Slauson Avenue
Maywood, CA 90270-2897

Cory Roberts
1600 West Beverly Boulevard
Montebello, CA 90640-3970

Chino Consunji
City Engineer
P.O. Box 1030
Norwalk, CA 90651-1030

Chris Cash
Utility and Infrastructure Assistant Director
16400 Colorado Avenue
Paramount, CA 90723-5091

Art Cervantes
Director of Public Works
P.O. Box 1016
Pico Rivera, CA 90660-1016
Ray Holland
Interim Public Works Director
30940 Hawthorne Boulevard
Rancho Palos Verdes, CA 90275

Greg Grammer
Assistant to the City Manager
2 Portuguese Bend Road
Rolling Hills, CA 90274-5199

Chris Marcarello
Director of PW
8838 East Valley Boulevard
Rosemead, CA 91770-1787

Ron Ruiz
Director of Public Works
117 Macneil Street
San Fernando, CA 91340

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22
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24
25
26
27
28

Daren T. Grilley
City Engineer
425 South Mission Drive
San Gabriel, CA 91775

Travis Lange
Environmental Services Manager
23920 West Valencia Blvd, Suite 300
Santa Clarita, CA 91355

Neal Shapiro
Urban Runoff Coordinator
1685 Main Street
Santa Monica, CA 90401-3295

John Hunter
2175 Cherry Avenue
Signal Hill, CA 90755

John Hunter
8650 California Avenue
South Gate, CA 90280

Leslie Cortez
Senior Administrative Assistant
3031 Torrance Boulevard
Torrance, CA 90503-5059

Jack Yoshino
Senior Management Assistant
P.O. Box 682
Walnut, CA 91788

Sharon Perlstein
City Engineer
8300 Santa Monica Boulevard
West Hollywood, CA 90069-4314

David Mochizuki
Director of Public Works
13230 Penn Street
Whittier, CA 90602-1772

Chuck Richie
Director of Parks and Public Works
2200 Huntington Drive
San Marino, CA 91108-2691

Sarina Morales-Choate
Civil Engineer Assistant
P.O. Box 2120
Santa Fe Springs, CA 90670-2120

James Carlson
Management Analyst
232 West Sierra Madre Boulevard
Sierra Madre, CA 91024-2312

John Hunter
1414 Mission Street
South Pasadena, CA 91030-3298

Joe Lambert
John Hunter
9701 Las Tunas Drive
Temple City, CA 91780-2249

Claudia Arellano
4305 Santa Fe Avenue
Vernon, CA 90058-1786

Samuel Gutierrez
Engineering Technician
P.O. Box 1440
West Covina, CA 91793-1440

Roxanne Hughes
Stormwater Program Coordinator
31200 Oak Crest Drive
Westlake Village, CA 91361

Gary Hildebrand
Assistant Deputy Director, Division Engineer
900 South Fremont Avenue
Alhambra, CA 91803

1 I am “readily familiar” with the firm’s practice of collection and processing
2 correspondence for mailing. It is deposited with U.S. postal service on that same day in the
3 ordinary course of business. I am aware that on motion of party served, service is presumed
4 invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for
5 mailing in affidavit.

6 I declare under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct.

8 Executed on December 10, 2012, at Santa Monica, California.

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Anna Kheyfets

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